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In the Supreme Court
of the
United States

October Term, 1910

No.

ELEANOR V. CURTIS, as Administratrix of the Estate of George F. Gibson, Deceased, etc.,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,

Respondent,

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Real Party in Interest.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

Petitioner, Eleanor V. Curtis, as administratrix of the estate of George F. Gibson, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, entered

in the above-entitled case (1 Civil No. 28,220) on December 17, 1970.

OPINIONS OF THE COURTS BELOW

The Superior Court of the State of California in and for the County of Alameda denied the motion of the Great Northern Railway Company to dismiss this action on the basis of forum non conveniens. The case is brought by a personal representative under the Federal Employers' Liability Act against the Great Northern Railway Company for damages for death arising out of an accident occurring in the State of Washington on August 29, 1969.

The record shows without conflict that the Great Northern Railway Company runs a line of railroad connecting up a transcontinental run at Bieber, California, with the Western Pacific Railroad. The railroad is a resident of California for venue purposes. The motion to dismiss in the lower court was denied without opinion. (Attached hereto as Exhibit A.)

The plaintiff made an uncontradicted showing of clear liability so that no convenience of defense witnesses was shown to be in any way involved as to liability.

In 1961, the California legislature enacted §400 of the Code of Civil Procedure to eliminate time-consuming venue appeals and to provide mandate as a substitute so that the matter of venue could be expeditiously disposed of in the pleading stage. In this connection, in *Hennigan v. Boren*, 243 Cal. App. 2d 813, the Court held that this code section provides

mandamus as the proper remedy and that "An appeal will not lie from an order denying a change of venue" by reason of the 1961 statute. This statute was in effect at the time of the filing of this action and is the law applicable to this case so far as California procedure is concerned.

C.C.P. §400 provides as follows:

> "When an order is made by the superior court granting or denying a motion to change the place of trial, the party aggrieved by such order may, within 10 days after service of a written notice of the order, or within such additional time not exceeding 20 days as the court may within the original 10 days allow, petition the court of appeal for the district in which the court granting or denying the motion is situated for a writ of mandate requiring trial of the case in the proper court. *The petitioner shall file a copy of such petition in the trial court immediately after the petition is filed in the court of appeal.* The court of appeal may stay all proceedings in the case, pending judgment on the petition becoming final. *The clerk of the court of appeal shall file with the clerk of the trial court, a copy of any final order or final judgment immediately after such order or judgment becomes final.*"

Great Northern Railway Company petitioned the Court of Appeal, First Appellate District, Division One, for a Peremptory Writ of Mandate to issue to reverse the lower court's opinion denying dismissal of the action. On October 20, 1970, this Court of Appeal reversed the lower court and ordered a Peremptory Writ of Mandate to Issue "to dismiss Ala-

nuda County Superior Court Action No. 394630, entitled 'Curtin v. Great Northern Railway Company.'" A true and correct copy of the opinion of the Appellate Court is attached as Exhibit B to this petition for a hearing.

The plaintiff administratrix then petitioned the Supreme Court of California to overrule the Appellate Court and to sustain the trial court. On December 17, 1970, the Supreme Court of California denied a hearing, with Justices Peters and Mosk dissenting. A copy of the order is attached hereto as Exhibit C.

Thereafter, the Court of Appeal issued the Peremptory Writ of Mandate ordering the lower court to dismiss the action, copy of which is attached hereto as Exhibit D.

Thus, the matter now stands as a final judgment of the Supreme Court of California in affirming the judgment of the Appellate Court that the case is dismissed. On the authority of *Hennigan v. Boren*, supra, this stands as a final judgment with no right of appeal under the applicable law relating to California Code of Civil Procedure §400 as of the date these proceedings were instituted.

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked because the case involves the application of the Federal Employers' Liability Act. In relation to the power of the state court to dismiss

an F.E.L.A. case properly brought under §6 of the Act (45 U.S.C.A. §56), the decision of the California court is in conflict with *Pope v. Atlantic Coast Lines R.R. Co.*, 345 U.S. 379, 97 L.Ed. 1094, 73 S.Ct. 749, which is the latest expression of the United States Supreme Court that there is no statutory or other authorization for a state court to dismiss an F.E.L.A. case properly brought under §6 of the Act.

It is well settled in California "that the relationship of debtor and creditor arises in tort cases the moment the cause of action accrues." (*Hansen v. Cramer*, 39 Cal. 2d 321, 245 Pac. 2d 1025.)

California courts regularly exercise jurisdiction in transitory causes of action arising out of claims connected with transactions which occurred in other states where the actions are brought against resident debtors or foreign corporations doing business in California. *Levenger v. Nadeau*, 215 Cal. 362. *Ryan v. North Alaska Salmon Co.*, 153 Cal. 436, 95 Pac. 862, *Reich v. Purcell*, 67 Cal. 551, 555, modifying the rule to the extent of saying that when California takes jurisdiction out of state tort actions, California may modify the rule of damages. See *McKee v. Dodd*, 152 Cal. 637, 93 Pac. 854, 125 Am. St. Rep. 82, 14 L.R.A.N.S. 780, *Ryan v. Clark Equipment Co.*, 268 Cal. App. 2d 679, *Scott v. Burke*, 39 Cal. 2d 388.

In California, an F.E.L.A. plaintiff suing a debtor doing business in California should have the same right to sue as any other creditor on a debt incurred outside the state. To deny this F.E.L.A. plaintiff such a right is to deny the privileges and immunities

granted him under Article IV and the 14th Amendment to the United States Constitution.

McKnett v. St. Louis and S.F. Ry. Co., 292 U.S. 230, 78 L.Ed. 1227;

Kelly v. Knott, 163 Southern 64, citing the applicability of United States Supreme Court cases;

Estate of Waits, 23 Cal. 2d 676, 146 Pac. 2d 5.

This California decision is contrary to the legislative intent of Congress and to the decisions of *McGovern v. Philadelphia & Reading R.R. Co.*, 235 U.S. 389, 59 L.Ed. 283; and *American Railroad Company v. Birch*, 224 U.S. 547, 32 S.Ct. 603, 56 L.Ed. 879, where Mr. Justice McKenna recognizes the personal representative as the plaintiff in a death action and says as to the wife, children or parents, "What difference can it make where they may reside?"

The decision in this case is contrary to the legislative intent.

The Federal Employers' Liability Act gives the plaintiff the choice of venue (45 U.S.C.A. §56). The Act specifically says the action may be brought where "the defendant shall be doing business at the time of commencing such action." The legislative intent was expressed by Senator Borah of Idaho, who was in charge of Senate Report No. 4320 H.R. 17263, 61st Congress, Second Session, 45th Congressional Record (1910) 4634:

> "The bill enables the plaintiff to find a corporation at any point or place or state where it is actually carrying on business and there lodge his action if he chooses to do so."

In *Baltimore and Ohio R. Co. v. Kepner*, 314 U.S. 44, 86 L.Ed. 28, this Court held that §6 of the F.E.L.A. creates the venue as a matter of federal privilege and that a denial of this federal privilege is governed by federal and not by state law. Mr. Justice Reed speaks of the legislative intent as follows:

> "The language finally adopted must have been deliberately chosen to enable the plaintiff in the words of Senator Borah, who submitted the report on the bill, 'to find the corporation at any point or place or state where it is actually carrying on business, and there lodge his action, if he chooses to do so.'"

At page 33 of the Lawyers' Edition, the Court in the *Kepner* case said:

> "The privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative, a course followed in securing the amendment of April 5, 1910 for the benefit of employees."

Similarly, in the case of *Miles v. Illinois Central R.R. Co.*, 315 U.S. 698, 86 L.Ed. 1129, Mr. Justice Reed in reaffirming the *Kepner* case, supra, stated:

> "The opportunity to present causes of action under the F.E.L.A. in the state courts came, however, not from the state law, but from the federal . . . this is so because the federal constitution makes the laws of the United States the supreme law of the land, binding on every citizen and

> every court and enforceable wherever jurisdiction is adequate for the purpose."

Mr. Justice Jackson in his concurring opinion stated:

> "Unless there is some hidden meaning in the language Congress has employed, the injured workman or his surviving dependants may choose from the entire territory served by the railroad any place in which to sue, and in either a federal or a state court in which to ask his remedy. There is nothing which requires the plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner.
>
> "It seems more probable that Congress intended to give the disadvantaged workman some leverage in the choice of venue than that it intended to leave him in a position where the railroad could force him to try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere."

JUDICIAL CODE 1404(a) ALLOWING TRANSFER IN FEDERAL COURTS "DOES NOT SPEAK TO STATE COURTS."

In *Pope v. Atlantic Coast Lines R.R. Co.*, 345 U.S. 379, 97 L.Ed. 1094, 73 S.Ct. 849, this Court pointed out that Congress had refused to pass the Jennings Bill, which required the injured employee to sue under F.E.L.A. where the accident happened. Then the Court considered the effect of Judicial Code 1404 (a) allowing federal courts, not state courts, to transfer the case from one federal district to another under the maxim of more convenient forum. In

Southern Ry. Co. v. Mayfield, 340 U.S. 1, 95 L.Ed. 3, the Court in a five to four opinion recognized that Judicial Code 1404(a) authorized to transfer—not dismiss—in federal courts. But in the later case of *Pope v. Atlantic*, 345 U.S. 379, 97 L.Ed. 1094, the Court expressly said with regard to the *Mayfield* decision that it was limited to federal court transfers and did not apply to state courts where there could be no transfer but only the more drastic action of dismissal. In this regard, Chief Justice Vinson stated in *Pope v. Atlantic Coast Lines*, supra, that §1404(a) of the Judicial Code "does not speak to state courts," it only speaks to federal courts in allowing the transfer.

As to state courts, the reasoning of Mr. Justice Rutledge in *United States v. National City Lines*, 334 U.S. 573, 92 L.Ed. 1584, as to the fallacy of the forum non conveniens maxim, still applied:

> "To have broadened the choice of venue for the reasons which brought about that action, only to have it narrowed again by application of the vague and discretionary power comprehended by forum non conveniens would have been incongruous, to say the least."

In *Pope v. Atlantic Coast Lines*, supra, Mr. Justice Vinson further pointed out that Congress might have applied a similar law to state courts by limiting the employee's choice of venue to the place of his injury or to the place of his residence. He points out that the Jennings bill sought to do this, but this bill did not become law. Consequently, he holds that the state court could not enjoin its resident from bringing an

alleged vexatious suit in a foreign forum for jurisdiction and concludes:

> "Since the narrow question in this case is simply whether the *Miles* case is still controlling; since we find no legislation which has devitalized it in any way, and since we find affirmative evidence that Congress chose to let it stand, the judgment must be reversed."

Mr. Justice Frankfurter in his dissenting opinion characterized the majority opinion ". . . as an iron restriction not to be touched beyond the literal scope of its Congressional rejection," and he concedes that the majority opinion adheres to *Kepner-Miles*. There is no statute giving state courts the right to transfer or dismiss, and the passage of 1404(a) of the Judicial Code shows that a statutory provision was required to give the federal courts limited rights to transfer, but not to dismiss.

The opinion of the Appellate Court which we are seeking to have reversed is based largely on language from *Gulf Oil Corp. v. Gilbert*, 33 U.S. 505, 507, 91 L.Ed. 1055, 1061. However, the *Gulf Oil* case supports our position rather than the opposition as to the F.E.L.A. in the following language:

> "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of forum non conveniens. But this was because the special venue act under which those cases are brought was believed to require it. *Baltimore & O. R. Co. v. Kepner*, 314 U.S. 44, 86 L. Ed. 28, 62 S. Ct. 6, 136 A.L.R. 1222; *Miles v. Ill. Cent. R.*

> *Co.*, 315 U.S. 685, 86 L. Ed. 1129, 62 S. Ct. 827, 146 A.L.R. 1104. Those decisions do not purport to modify the doctrine as to other cases governed by the general venue statutes . . .
>
> "Federal Employers' Liability Act, however, which controlled decision in the *Kepner* case, specifically provides where venue may be had in any suit on a cause of action arising under that statute. What the court below refers to as 'congressional act, plus judicial interpretation,' is the general statute of venue in diversity suits, plus our decision that it gives the defendant 'a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election', *Neirbo Co. v. Bethlehem Shipbuilding Corp.*" 308 U.S. 165, 1968, 84 L. Ed. 167, 170, 60 S. Ct. 153, 128 A.L.R. 1437. The Federal Employers' Liability Act, as interpreted by *Kepner*, increases the number of places where the defendant may be sued and makes him accept the plaintiff's choice . . ."

FEDERAL LAW GOVERNS

In *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 96 L. Ed. 398, 72 S. Ct. 312, Mr. Justice Black held that

> ". . . only if federal law controls can the federal act be given that uniform application throughout the country essential to effectuate its purpose . . . Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the Federal Acts Administration [and so he held that a jury trial is] 'part and parcel of the remedy afforded railroad work-

> ers under the Employers' Liability Act. And he held that to deprive them of this 'is to take away a good portion of the relief which Congress has afforded them.'"

Similarly, in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 22 L.Ed.2d 344, this Court held that the need for uniformity in enforcing the Railway Labor Act prevents the exercise of state authority which might impose inconsistent standards or judicial legislation.

In spite of the fact that Governor Earl Warren vetoed California Senate Bill 789 providing for a forum non conveniens and that Congress refused to pass the Jennings Bill which was H.R. 1639, 80th Congress, First Session, providing that the plaintiff must sue where the accident happened, we are now told that the California court can by judicial legislation achieve what railroads and their lobbies failed to gain by legislative action. This judicial legislation is justified by invoking the so-called maxim of "forum non conveniens." Detailed consideration of this maxim reminds one of Ezra Pound's wise comment that "most maxims should be called minims, as they compress a minimum of sense into a maximum of pretentiousness."

In California, for example, after holding in *Price v. A.T. & S.F. Ry. Co.*, 42 Cal. 2d 577, 268 Pac.2d 457, that the maxim of "forum non conveniens" could be considered, Mr. Justice Peters, in speaking for the California court in *Thomson v. Continental Insurance Co.*, 66 Cal. 2d 738, held that the maxim of

forum non conveniens does not apply where the plaintiff is a California resident, and that "the doctrine if typically applied to litigation where all of the parties are out-of-state residents and where the cause of action arose outside the forum state."

AN F.E.L.A. CASE IS A TRANSITORY ACTION RECOGNIZED BY THE CALIFORNIA SUPREME COURT AS A DEBTOR-CREDITOR RELATIONSHIP TO BE ENFORCED WHEREVER THE DEBTOR CAN BE FOUND

In the *Estate of Waits*, 29 Cal. 2d 678, 168 Pac. 2d 5, Mr. Justice Traynor, speaking for the California court, held that the Federal Employers' Liability Act creates a debtor-creditor relationship; and the debt being transitory may be enforced wherever the debtor can be found. As to this, he said, "It would be idle to permit the appointment of an administrator and then have the trial court refuse to exercise its jurisdiction over the action."

By a parity of reasoning where the legislative intent, as expressed by Senator Borah, who was in charge of the bill in the Senate, is to allow the plaintiff to "lodge his action wherever the railroad could be found carrying on business," it would be idle to allow such lodging of the action and not permit the trial court to proceed with the action. This would be a definite rejection of the obvious intention of the legislature in providing for this broad and liberal selection by the plaintiff.

In making the decision in the *Estate of Waits*, supra, Mr. Justice Traynor relied on the opinion of

Mr. Justice McKenna in the case of *American R. Co. v. Birch*, 224 U.S. 547, 32 S.Ct. 603, 56 L.Ed. 879. In this *Birch* case, Mr. Justice McKenna said that in giving the right to the personal representative, Congress did not give the right to the widow to sue:

> "That the words of the Act will not yield to such liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured, or 'in case of death . . . to his or her personal representative.' . . . This distinction between the parties to sue and the parties to be benefited by the suit makes clear the purpose of Congress. To this purpose we must yield."

In *McGovern v. Philadelphia & Reading R.R. Co.*, 235 U.S. 389, 59 L.Ed. 283, there was an action under the F.E.L.A. brought by the personal representative in the U.S.A. for the benefit of surviving relatives who were non-resident aliens residing in Ireland. The lower court had held that since the non-resident aliens were the beneficiaries, the resident personal representative could not maintain the action. Mr. Justice McKenna took a more liberal view and said:

> ". . . the policy of the Employers' Liability Act accords with and finds expression in the universality of its language. Its purpose is something more than to give compensation for the negligence of railroad companies.
>
> "The rights and remedies of the statute are the means of executing its policy. If this 'puts burdens on our own citizens for the benefit of non-resident aliens,' . . . it is a burden imposed for wrongdoing that has caused the destruction of

> life. It is for the protection of that life that compensation for its destruction is given and to those who have relation to it. These may be the wife, children, or parents. The statute, indeed, distinguishes between them, but what difference can it make where they may reside? It is the fact of their relation to the life destroyed that is the circumstance to be considered, whether we consider the injury received by them or the influence of that relation upon the life destroyed."

The above decision of the Supreme Court of the United States shortly after the enactment of the Federal Employers' Liability Act is in line with the other cases decided by the United States Supreme Court that the law is to be given a liberal construction in order to accomplish its humanitarian and remedial purposes and to advance the remedy for the protection of the railroad employee.

See *Urie v. Thompson*, 69 S.Ct. 1018, 337 U.S. 163, 93 L.Ed. 1282; 11 A.L.R. 2d 252; *Coray v. Southern Pacific*, 69 S.Ct. 275, 335 U.S. 520, 93 L.Ed. 208.

THE PRIVILEGES AND IMMUNITIES CLAUSES OF ARTICLE IV AND THE 14TH AMENDMENT PREVENT CALIFORNIA FROM DISCRIMINATING AGAINST AN F.E.L.A. CREDITOR SUING A RESIDENT DEBTOR ON RIGHTS ARISING OUT OF FEDERAL LAWS

In line with the view that the right of action is regarded as having a situs as for a debt in each jurisdiction where the plaintiff is authorized to maintain his suit, it makes no difference whether the plaintiff

is resident, or non-resident, as the debtor can always be sued at his residence, or where he can be found, or where he runs a line of railroad under §6 of the F.E.L.A. Under this rule there is no basis for assigning the cause of action to any particular locality. "The location assigned to it depends on what action is to be taken with reference to it." (*Estate of Waits*, 23 Cal. App. 688, 151 Pac. 35.) From this point of view, the case of *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 78 L.Ed 1227, applies:

> "The privileges and immunities clause requires a state to accord the citizens of other states substantially the same right of access to its courts as do the courts to its own citizens . . . The plaintiff is cast out because he is suing to enforce a federal act. The state may not discriminate against rights arising out of federal laws."

See also *Kelly v. Knott* (Fla.), 163 Southern 64 (reversed on other grounds, 298 U.S. 544, 80 L.Ed. 1321; mandate conforms to 168 Southern 416):

> "We recognize, of course, the general rule that a state statute discriminating, or undertaking to discriminate, against non-resident creditors of a foreign corporation permitted to transact business in the state of Florida would be unavailing for such purpose, in view of these provisions of the Federal Constitution guaranteeing to citizens of each state the privileges and immunities of the several states. *Sully v. Am. Nat. Bank*, 178 U.S. 289, 20 S. Ct. 935, 44 L. Ed. 1072; *Blake v. McClung*, 172 U.S. 239, 19 S. Ct. 165, 43 L. Ed. 432; Id. 176 U.S. 59, 20 S. Ct. 307, 44 L. Ed. 371; *Maynard v. Granite State Provident Assn.*,

92 Fed. 435; *Clark v. Willard*, 292 U.S. 112, 54 S. Ct. 615, 78 L. Ed. 1160."

This same point of view is continued through the decisions of the United States Supreme Court up to and including the *Pope* case, with the only exception appearing in *Mayfield*, decided prior to *Pope*, and really only applying to 1404(a) of the Judicial Code as to federal courts, particularly in the light of the limitations later set forth in *Pope*.

Mr. Justice Black has wisely commented (*Francis v. S.P.*, 92 L. Ed. 798) as to judge-made maxims applying to statutory remedies:

> "Experience might prove that a rule created by judges should never have been created at all . . . or developments may arise which imperatively require its revision or abandonment. There are inherent dangers in judge-made laws. They should not create standards contrary to the legislative intent which may become a scandal and a hissing in the future."

CALIFORNIA LAW ALLOWS ANY TRANSITORY ACTION ON A DEBT: F.E.L.A. IS ON A DEBT: WHEREVER DEBTOR CAN BE FOUND

An *F.E.L.A.* case is a transitory action recognized by the California Civil Code as a debtor-creditor relationship to be enforced wherever the debtor can be found.

§3439.01 of the California Civil Code provides that

> " 'Creditor' is a person having any claim whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

and,

> "'Dept' includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

In *Hansen v. Cramer*, 39 Cal. 2d 321, at 323, 245 Pac. 2d 1095, the court states:

> "It is well settled in this state that the relationship of debtor and creditor arises in tort cases the moment the cause of action accrues."

California courts always have and do exercise jurisdiction in transitory causes of action brought by creditors arising out of claims connected with transactions which occurred elsewhere where the actions are brought against resident debtors or foreign corporations doing business in California.

McKee v. Dodd, 152 Cal. 637 (93 P. 854, 125 Am. St. Rep. 82, 14 L.R.A.N.S. 780); *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438 (95 P. 862); *Luikart v. McDonald*, 11 Cal. App. 2d 433 (53 P. 2d 1011); *Faras v. Lower California Dev. Co.*, 27 Cal. App. 688 (151 P. 35); *Roberts v. Dunsmuir*, 75 Cal. 203 (16 P. 782); *Loranger v. Nadeau*, 215 Cal. 362 (10 P. 2d 63, 84 A.L.R. 1264); *Hudson v. Von Hamm*, 85 Cal. App. 323 (259 P. 374).

In *Loucks v. Standard Oil Co.*, 224 N.Y. 99 (120 N.E. 198, 202), it was said:

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of jus-

tice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."

It is still the law, as stated in *Loranger v. Nadeau*, supra, and *Ryan v. North Alaska Salmon Co.*, supra, where the action is transitory ". . . a right or liability imposed by the statute of another state or of the United States . . ." may be asserted and enforced in this state. Our Supreme Court in *Reich v. Purcell*, 67 Cal. 551 at 555 only changed or modified the rule of *Loranger* and *Ryan* to the extent of saying that, while California will take jurisdiction of such tort actions, California may modify the rule of damages. No case has gone to the extent of saying that California could modify the supreme law of the land as passed by Congress on such a statutory remedy as the Federal Employers' Liability Act.

So, California has been taking jurisdiction of these out-of-state transitory tort actions for debt, for nonresidents, suing foreign corporations doing business in California. The *Loranger* and *Ryan* cases were such cases, and so was the *Reich v. Purcell*, which modified the *Loranger* and *Ryan*. In *Reich*, the court took jurisdiction and tried the case for nonresidents where the accident occurred in Missouri and the suit was against a California resident. Similarly, in *Fuller v. Greenup*, 267 Cal. App. 2d 10, California court took jurisdiction over a tort action occurring in British Columbia but where the defendant could be sued as on the debt in California.

Similarly, in *Scott v. Burke*, 39 Cal. 2d 388, Mr. Justice Shauer decided a transitory action where the

accident occurred in Arizona and the defendant was sued as a California resident. In the case of *Ryan v. Clark Equipment Co.*, 268 Cal. App. 2d 679 (Molinari) (Jan. 1970), plaintiff and her children were residents of Oregon and the accident took place in Oregon, but the suit was allowed in California against a Michigan corporation doing business in California.

Thus, the whole story is that California has been entertaining all of these transitory actions brought for debt against foreign corporations in California, with the only exception being the attempted discrimination against actions based on federal law as in the *Price* case. Such conduct is a clear violation of the Privileges-and-Immunities Clause of the United States Constitution. Furthermore, it would appear that this is a more favorable consideration of foreign corporations who are sued on a debt than is given to domestic corporations in violation of the California State Constitution, which provides that in no event will a foreign corporation be given more favorable consideration than a domestic corporation. (See California Constitution, Article XII, §§15 and 16:

> "§15: Foreign Corporations: No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are presented by law to similar corporations organized under the laws of this state.")

In *Ranconi v. Richmond-Martinez Title Company*, 152 Cal. App. 2d 290, 313 Pac. 2d 30, the court held that under Article XII, §16 of the Constitution of the

State of California, the corporation may be sued in the county where a contract is made, where it is to be performed, where the obligation arises, where the breach occurs, or where the corporation has its principal place of business. This is pointed out in 22 Cal. Jur. §61, p. 48, in reference to foreign corporations, and §15 and §16 of the Constitution as follows:

> "This provision does not distinguish between foreign and domestic corporations and for purposes of venue a foreign corporation is situated at the address of its principal office within the state as shown by the statement filed by it, and a domestic corporation is situated at the address shown in its articles. Both of these places satisfy the constitutional language relating to the principal place of business of the corporation in the state."

The rights of defendant corporations as to venue are governed by Article XII, §16, and not by C.C.P. §395. (*Pacific Bal Industries v. Northern Timber, Inc.*, 118 Cal. App. 2d 815, 259 Pac. 2d 465.) This provision of the Constitution provides for torts as well as for contracts. (*Rutherford v. New York Hanseatic Corp.* (1957) 153 Cal. App. 2d 462, 314 P. 2d 560.)

In *Searles v. Greyhound Corporation*, 180 Cal. App. 2d 463, 4 Cal. Rptr. 206, and in *Shida v. Japan Food Corp.*, 185 Cal. App. 2d 443, 8 Cal. Rptr. 271, the court has held that the Constitution, Article XII, §16, pertaining to venue of actions against a corporation, relates to the place of trial, not merely the place where an action may be commenced, and applies to

actions sounding in tort as well as to actions on contract. In the *Searles* case, the court held:

> "Article XII, §16 of the California Constitution reads: 'A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases.' The constitutional provision relates to the place of trial, not merely to the place where an action may be commenced, and it applies to actions sounding in tort as well as to actions upon contract. (*Ray Wong v. Earle C. Anthony, Inc.*, 199 Cal. 15 [247 P. 894.]"

Under this constitutional section, the corporation which is properly sued and which challenges venue may obtain an order changing venue only to the county of its principal place of business, and in *Gutierrez v. Superior Court*, 243 Cal. App. 2d 710, 52 Cal. Rptr., 592, Judge John B. Molinari stated:

> "Before proceeding with a discussion of the applicability of the subject rule to the instant case it should first be noted that 'A corporation . . . may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases.' (Cal. Const. Art. XII, §16.) This provision is self-executing, applies to

domestic and foreign corporations (*Hale v. Bohannon*, 38 Cal. 2d 458, 470, 475, 479 [241 P. 2d 4]; *Ellis v. National Casualty Co.*, 99 Cal. App. 2d 463, 465 [4 Cal. Rptr. 295]; *Ray Wong v. Earle C. Anthony, Inc.*, 199 Cal. 15, 17 [247 P. 894])."

The constitutional provision for venue in suing a corporation on contract is self-executing, applies to domestic and foreign corporations, and may be invoked in ex delicto actions, and is governed by Article XII, §15 and §16 and not by the Code of Civil Procedure, §395. The Constitution only mentions the power to change the place of trial in the state and gives no right to dismiss the action. The Constitution overrides both §395 and the recent forum non conveniens section referred to by the opposition, C.C.P. §140.30. Furthermore, the Constitutional provisions do not distinguish between residents or non-residents and give no basis at all for discrimination against non-resident non-citizens suing a foreign corporation on a debt in California.

In line with these constitutional provisions, all non-residents can bring transitory actions on debts against the foreign corporations doing business in California on the same basis as citizens can. These self-executing provisions allow all such transitory actions. See *Kupersmith v. S. F. Shippers, Inc.*, 181 Cal. App. 2d 144, 5 Cal. Rptr. 123, where the court states:

"So far as the rights of the corporate defendants are concerned, venue is governed, not by §395 of the Code of Civil Procedure, but by the self-executing provisions of §16, Article XII, of

the California Constitution. (Hale v. Bohannon, 38 Cal. 2d 458, 470 [241 P. 2d 4]; Blumer v. Kirkman Corp., 38 Cal. 2d 480, 485 [241 P. 2d 17].)"

C.C.P. §410.10 states:

"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

(Cf. California Constitution, Art. XII, §15 and §16 and United States Constitution re privileges and immunities, 14th Amendment, Article IV, §2.)

In the light of these constitutional provisions, as well as the decisions of the court previously mentioned, it is obviously a denial of the privileges and immunities of the citizens of the other states to say that a Federal Employers' Liability Act plaintiff non-resident cannot sue a defendant foreign corporation doing business in California as a creditor on an F.E.L.A. debt when every other non-resident creditor on every other debt has a right to bring such an action and it has been held under Article XII, §16 of the California Constitution that the constitutional provision relates to the place of trial and not merely to the place where an action would be commenced. (*Searles v. Greyhound Corp.*, (1960) 180 Cal. App. 2d 463, 4 Cal. Rptr. 206; *Shida v. Japan Food Corp.*, 185 Cal. App. 2d 443, 8 Cal. Rptr. 271.)

Similarly, in the case of *Miles v. Illinois Central R.R. Co.*, 315 U.S. 698, 86 L.Ed. 1129, Mr. Justice Reed, in reaffirming the *Kepner* case, supra, stated:

> "The opportunity to present causes of action under the F.E.L.A. in the state courts came, however, not from the state law, but from the federal . . . this is so because the federal constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and enforceable whenever jurisdiction is adequate for the purpose."

Mr. Justice Jackson in his concurring opinion stated:

> "Unless there is some hidden meaning in the language Congress has employed, the injured workman or his surviving dependants may choose from the entire territory served by the railroad any place in which to sue, and in either a federal or a state court in which to ask his remedy. There is nothing which requires the plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner.
>
> "It seems more probable that Congress intended to give the disadvantaged workman some leverage in the choice of venue than that it intended to leave him in a position where the railroad could force him to try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere."

So when the *Mayfield* case got back to the Supreme Court of Missouri, the *state court* refused to apply forum non conveniens and said (*State v. Mayfield*, 240 S.W.2d 108, 109):

> "The policy of this state has been to bar none of its citizens from its courts where there is proper venue and jurisdiction of the parties and subject

> matter, and this applies to citizens who are residents as well as non-residents . . . Since the policy of this state has been, and is, to allow citizens of Missouri (resident and non-resident) to bring and maintain suits under the Federal Employers' Liability Act in the courts of this state, we cannot bar citizens of other states from doing likewise." Certiorari was denied.

Since California has always allowed suits by anyone wherever the debtor can be found and F.E.L.A. is a suit on a debt, it should have said in *Price* as the Missouri court did above, following the United States Supreme Court in *Mayfield*, that the dismissal may only be had in the state court:

> "If in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially, see *McKnett v. St. Louis & S.F. R. Co.*, 292 U.S. 230, so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges and Immunities Clause of the Constitution."

The railroads raise these points by trying to make the courts think that the cases are brought in the wrong place. As Mr. Justice Jackson said they resort to the fantastic fiction that they are being annoyed by a widow and her attorney. Actually, the railroads are only using this device of forum non conveniens to try to wiggle out of the larger payments they would have to make in the metropolitan centers where the law gives the plaintiff the right to go. They are constantly seeking to get the dice loaded in their

favor in this gamble of the law, irrespective of what the law may be.

THE VENUE PROVISION IS AN INHERENT PART OF F.E.L.A.

In line with the humanitarian and liberal purposes of the Act, the plaintiff's right to choose the venue has been considered as a "substantial right" and the United States Supreme Court has said that that plaintiff's choice of forum "should rarely be disturbed."

Boyd v. Grand Trunk Western R. Co., 338 U.S. 263, 70 S.Ct. 126, 94 L.Ed. 55;

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055.

Similarly, in *Akerley v. New York Central R. Co.*, 168 F.2d 812, the Sixth Circuit judges concur that the F.E.L.A. "makes the venue provision an inherent part of the employers' liability. An attempt to limit it by contract is an attempt to exempt the railroad from liability, and is void."

There is no statute giving state courts the right to transfer or dismiss, and the passage of 1404(a) of Judicial Code required a statutory provision to give the federal courts limited rights to transfer, but not to dismiss.

THE RAILROAD DEFENDANT IS RESIDENT IN CALIFORNIA FOR VENUE PURPOSES

Since the *Mayfield* case and following the *Pope* case, *Pure Oil Co. v. Suarez* (1966) 384 U.S. 202, 15 L.Ed. 2d 474, 86 S.Ct. 1395, further modified the *Mayfield* and *Price* cases. These cases point out in the light of 28 U.S.C. §1391(c), a Jones Act or an F.E.L.A.

defendant is resident wherever it is doing business. 28 U.S.C. §1391 (c) provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed or is doing business and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Consequently, a motion to transfer on grounds of forum non conveniens is properly denied if the plaintiff chooses to sue the defendant at its residence. In this connection, the United States Supreme Court in *Pure Oil*, supra, goes back to the first point made in this brief as to Congressional intent, and states that the purpose of the law was to give these injured men "substantive rights and a generous choice of forum for their vindication."

Similarly, in *Pierce v. Elk Towing Co.*, 36 F. Rptr. 2d 504, decided on rehearing August 3, 1966, the Circuit Court of Appeals reversed the lower court for not applying the expanded revision of the Judicial Code, 28 U.S.C.A. §1391(c) on the authority of United States Supreme Court decision in *Pure Oil v. Suarez*, supra.

In this regard, see *Blanco v. Gulf Coast*, 235 F. Supp. 197 at 201 and the specific provisions of the Jones Act, §688, 46 U.S.C.A., providing that the Jones Act and the Federal Employers' Liability Act are read together.

In line with the *Pure Oil* decision, supra, the more recent cases have been holding that seamen should not be restricted as to where they may look for satis-

faction of their rights, and of course the same rule applies under F.E.L.A.

Goodin v. Sinclair Refining Co., 378 F.2d 576;
Harley v. Sioux City, 379 F.2d 356;
Flaiz v. Moore, 353 S.W.2d 74 (Texas).

In line with *Pure Oil*, saying that ". . . the basic intent of the Congress is best furthered by carrying the broader residence definition of §1391(c) into the Jones Act," and in line with the *Estate of Waits*, supra, in California, holding that a debt is transitory and the F.E.L.A. is such a debt which may be enforced against the debtor wherever you find him, this case does not even apply to the type of litigation mentioned in *Mayfield* or in *Thomson v. Continental Insurance Co.*, 66 Cal. 2d 738, that the maxim of forum non conveniens "is typically applied to litigation where all of the parties are out-of-state residents." In *Mayfield* Mr. Justice Jackson speaks of providing a court "for two non-resident parties to litigate." In the light of the *Pure Oil* decision and 28 U.S.C. 1329 (c), if the defendant is doing business and running a line of railroad in California, California, by this very statute, is to be "regarded as the residence of such corporation for venue purposes."

CONGRESS NEVER INTENDED THAT AN INJURED F.E.L.A. PLAINTIFF WOULD HAVE TO TRY TWO CASES TO GET ONE DECIDED

Congress never intended that an injured F.E.L.A. plaintiff would have to try two cases to get one decided, and this maxim of forum non conveniens

cries out for revision to avoid the result and to insure the application of Congressional intent stated by Senator Borah that the law "enables the plaintiff to find a corporation at any point or place or state where it is actually carrying on business and there lodge his action if he chooses to do so." Mr. Justice Traynor in *Estate of Waits*, supra, disposed of the argument that the plaintiff may then be transferred when he said:

> ". . . it would be idle to permit the appointment of an administrator and then have the trial court refuse to exercise its jurisdiction over the action."

It is equally idle for Congress to say plaintiff may lodge his action where he chooses, but the trial court can "refuse to exercise its jurisdiction over the action."

Way back in the time of Mr. Justice McReynolds, in *Denver & R.G.W. R. Co. v. Terte*, 284 U.S. 284, 76 L.Ed. 295, 297, the United States Supreme Court said:

> ". . . as a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the State and retain or refuse jurisdiction according to the relative inconvenience of the parties."

Today, as well as in 1931, as a practical matter, the Courts cannot undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the state and retain or refuse jurisdiction according to the relative inconven-

ience of the parties. To do this intelligently, they would have to try the case and know all about the facts and relevant evidence, and some of the cases say they would have to have a "crystal ball" and an "apothecary's scale" to weigh the balance of admitted liability and testimony relating thereto as against the importance of medical testimony which might be available to the plaintiff in the forum but not elsewhere, particularly as to important items such as rehabilitation, future treatment, future disability, and percentages of disability.

THIS CASE WOULD NOT EVEN JUSTIFY TRANSFER IN A FEDERAL COURT UNDER JUDICIAL CODE 1404(a) "FOR THE CONVENIENCE OF PARTIES AND WITNESSES IN THE INTERESTS OF JUSTICE."

Our courts put the burden on the railroad of showing and proving what they claim as to the testimony and convenience of witnesses. Here they have not sustained that burden. They have not shown the nature or relevancy of any alleged testimony.

Dillman v. Superior Court, 205 Cal. App. 2d 769, 74 A.L.R. 2d 64, 65, citing the general rule in many California cases.

The defense cannot be heard to complain about inconvenience to plaintiff's witnesses. These witnesses establish the liability without any suggested or claimed contradiction by defendant.

Clendenin v. United Fruit Co., 214 Fed. Supp. 137;

Heiser v. United Air Lines, 167 Fed. Supp. 237;

Cline v. New York Central, 193 Fed. Supp. 206; *Marks v. Fireman's Fund Ins. Co.*, 109 Fed. Supp. 800 at 803.

CONCLUSION

A hearing should be granted on this matter so that state courts will follow the federal rule as announced in *Pope v. Atlantic Coast Lines*, supra, holding that Judicial Code 1404(a) does not apply to state courts. Similarly, the state courts should not deny privileges and immunities of F.E.L.A. plaintiffs where they hear transistory actions for debt brought by other non-residents. They are bound by *McKnett v. St. Louis & S.F. R. Co.*, 292 U.S. 230, 78 L.Ed. 1227, to enforce their policies impartially and not to discriminate against the non-resident F.E.L.A. plaintiff.

The proper ruling by this court as to the applicable federal law will avoid inconsistent rulings that have been made in the various states and by various judges depending upon the philosophy of the individual judge in applying this judicial legislation of forum non conveniens.

Mr. Justice Carter in his dissent in the poorly considered case of *Price v. A.T. & S.F. Ry. Co.*, 42 Cal. 2d 577, pointed out what would result from that case when he said:

> "The incidental injustice to a railroad in an isolated or exceptional case resulting from the exercise of the right to choose forum is as nothing compared to the chaos, confusion and gross in-

> justice that results in cases where the plaintiff must first litigate for months on end his venue selection, with affidavits, motions, briefs, hearings, and numerous delays, and with one judge in one particular case sustaining jurisdiction over a certain railroad company and another judge in the adjoining courtroom denying it. To have the venue of actions determined by such a system is not rule by law, but rule by whim and caprice. On the same identical state of facts conflicting and varying decisions may be handed down by different courts and a great volume of litigation is thus bound to rise over preliminary questions."

This liberal court should not require an F.E.L.A. railroad employee to be thus shoved around and delayed and frustrated in asserting his remedy. This is also contrary to the Congressional intent and the humanitarian purposes of the law. In *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 2 L.Ed.2d 799, 78 S.Ct. 758, the United States Supreme Court (Brennan, J.) said that the F.E.L.A.

> ". . . was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. . . . The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the F.E.L.A. seeks to adjust that expense equitably between the worker and the carrier. . . . The Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the

strength of those who in the nature of the case ought to share the burden."

S. Rep. No. 460, 60th Cong., 1st Session 3.

This outlook is certainly not consistent with the maxim of forum non conveniens as the defense would apply it to require the plaintiff to try two cases to get one decided or to force him to bring his case where the accident happened even though Congress has refused so to legislate.

So this ridiculous maxim has already led us to the point of requiring the injured railroad employee to try two cases to get one decided and is resulting in the obstructing of justice and utter confusion, while the decisions of the lower court with regard to the Great Northern Railway Company which runs a line of railroad into California have so far been seven to one against the railroad on this maxim. It may well be that in the application of this capricious maxim that other judges in adjoining courtrooms may now follow the erroneous decision of the appellate court.

We respectfully request this Court to review this case and to bring it in line with this Court's decision in *Pope v. Atlantic Coast Lines*, 345 U.S. 379, 97 L. Ed. 1094, 73 S.Ct. 849. There is no statutory or other authority for a state court to dismiss an F.E.L.A. case properly brought under §6 of the Act (45 U.S. C.A. §56), and if California allows non-resident transitory plaintiffs to sue for a debt where the debtor may be found in California, it is a denial of the equal protection of the laws under *McKnett v. St.*

Louis & S.F. R. Co., 292 U.S. 230, 78 L.Ed. 1227, 54 S.Ct. 690, to discriminate against the non-resident F.E.L.A. plaintiff who sues a railroad debtor on a transitory action arising out of federal law.

Dated, Oakland, California,
January 11, 1971.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Petitioner.

(Exhibits Follow)

Exhibit A

Superior Court of the State of California
in and for the County of Alameda

Dept. 20

Date: March 3, 1970.
Hon. Robert H. Kroninger, Judge.
C. L. Chase, Deputy Sheriff.
Robert W. Coolican, Deputy Clerk.
Dorothy French, Reporter.

Action No. 394630

Eleanor V. Curtin, Administratrix of the Estate of George F. Gibson, etc., Deceased,
Plaintiff,

vs.

Great Northern Railway Company, a corporation,
Defendant.

No counsel appearing for Plaintiff.
No counsel appearing for Defendant.

MINUTE ORDER
Denying Defendant's Motion to Dismiss

The above entitled matter having been submitted on February 24, 1970, the Court now orders that the defendant's motion to dismiss denied. Respective

counsel notified by mailing a copy of this minute order.

This civil minute order was duly entered in R/A and a copy placed in the file.

Attest: Jack G. Blue,
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Alameda
By Robert W. Coolican, Deputy.

Exhibit A-1

Superior Court of the State of California
for the County of Alameda

No. 394630

Eleanor V. Curtin, Administratrix of the Estate of George F. Gibson, etc., Deceased,
Plaintiff,
vs.
Great Northern Railway Company, a corporation,
Defendant.

JUDGMENT DENYING MOTION TO DISMISS

The motion of defendant Great Northern Railway Company, a corporation, to dismiss the above entitled action, having come on regularly to be heard on the 24th day of February, 1970, Burton Mason of the law firm of Crosby, Heafey, Roach & May Professional Corporation, appearing on behalf of said defendant, and Clifton Hildebrand, of the law firm of Hildebrand, McLeod & Nelson, appearing on behalf of plaintiff; and this Court having made its order denying defendant's motion to dismiss, based upon all of the pleadings, papers and documents supporting the motion and upon oral argument; and the Court being fully advised and good cause appearing therefor;

It Is Hereby Ordered, Adjudged and Decreed that defendant's motion to dismiss is denied in favor of the plaintiff.

Dated, presented for signature and signed March 13, 1970.

Robt. H. Kroninger,
Judge of the Superior Court.

Endorsed, Filed, March 13, 1970,
Jack G. Blue, County Clerk,
Robert W. Coolican, Deputy.

Exhibit B

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 28,220

Great Northern Railway Company,
Petitioner,

vs.

Superior Court, County of Alameda,
Respondent.

Eleanor V. Curtin, as Administratrix of the Estate of George F. Gibson, Deceased, etc.,
Real Party in Interest.

OPINION

Petitioner Great Northern Railway Company (Great Northern) seeks a peremptory writ of mandate directing the Alameda County Superior Court to dismiss an action upon the ground of *forum non conveniens*. The superior court had previously denied a motion to dismiss based upon the same ground.

The record of the superior court now before us discloses the following.

The principal place of business of Great Northern is St. Paul, Minnesota. It has general offices in the State of Washington at Seattle and Spokane. The company operates over 1,310 miles of trackage in that state. In California it has about 63 miles of single track running from the Oregon border to Bieber in Lassen County. Freight only is carried over the California system, which connects with the Western Pacific Railroad, and over which 10 or 12 freight trains travel each way each week. The company also maintains "off-line" offices in California for solicitation of business.

George F. Gibson was employed by Great Northern as a freight train brakeman. He resided with his wife in Spokane, Washington. On August 29, 1969, Mr. Gibson, while performing his duties as brakeman, came into collision with a side girder of a bridge on Great Northern's main line between Wenatchee and Spokane, as a result of which he died instantly.

His sole survivor and heir is his widow who has continued to reside in Spokane. She employed the Alameda County law firm of Hildebrand, McLeod and Nelson to commence a wrongful death action against Great Northern under the Federal Employer's Liability Act (Title 45, U.S.C., § 51 et seq.). That firm thereupon secured the appointment of its employee, Eleanor V. Curtin, as California Administratrix of the Estate of Mr. Gibson. Thereafter Hildebrand, McLeod and Nelson, acting as attorneys for the administratrix, filed in Alameda County the action from which these mandate proceedings have arisen.

Eleanor V. Curtin is a resident of the County of Alameda and State of California. (She will hereinafter be described as plaintiff.) At least ten persons with knowledge of the circumstances of the accident, all of whom live in or near Spokane, Washington, will necessarily be called as witnesses at the trial. Neither party will call any resident of California as witness.

Save for the cause of action against Great Northern Mr. Gibson left no estate in California. In Alameda County a superior court jury case ordinarily reaches trial in not less than 18 months after it is at issue. In the United States District Court at Spokane, Washington, such a trial is reached about 90 days after issue, while in the Superior Court of the State of Washington for Spokane County an action will reach jury trial from 4 to 6 months after issue is joined. The statute of limitations for commencement of Federal Employer's Liability Act actions in Washington will not have run until August 29, 1972 (Title 45 U.S.C., § 56). The cost of a California trial to Great Northern will be $5,000 more than if it were to be held in Washington.

It is conceded that under the Federal Employers Liability Act an action may be filed in any state where a defendant railroad company "resides," or where the cause of action arose, or in which it may be doing business at the time of the commencement of the action (Title 45 U.S.C., § 56). Since Great Northern was doing business in California at the time of the subject action, its *venue* was properly

laid in that state, which became vested with *jurisdiction* over both the subject matter of the action and its parties. The heavy emphasis by plaintiff that California has such *jurisdiction* is misdirected and irrelevant to the issues before us. The concept of *forum non conveniens* is quite different from that of venue or jurisdiction. As was said in *Price v. Atchison, T. & S.F. Ry. Co.*, 42 Cal.2d 577, 580, and *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."

The doctrine has been variously defined. *Leet v. Union Pac. R.R. Co.*, 25 Cal.2d 605, 609, states: "The rule of *forum non conveniens* is an equitable one embracing the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action before it may be more appropriately and justly tried elsewhere." In *Canada Malting Co. v. Paterson Co.*, 285 U.S. 413, 423, Mr. Justice Brandeis wrote, "Courts of equity and of law occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." Fifteen years later the same court wrote (*Gulf Oil Corp. v. Gilbert*, supra, 330 U.S. 501, 507): "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.

These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself." Recently the Judicial Council of California, in its "1969 Annual Report to the Governor and the Legislature" spoke of the doctrine in this manner: "The various bases of judicial jurisdiction recognized under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution establish the outermost limits beyond which a state court may not exercise its judicial jurisdiction. Within those limits, the owner of a transitory cause of action will often have a wide choice of forums in which to bring his action. Some of these forums may have little relation either to the parties or to the cause of action, and suit in them may increase greatly the burden to the defendant of making a defense. Under the doctrine of inconvenient forum, a court, even though it has jurisdiction, will not entertain the suit if it believes that the forum of filing is a seriously inconvenient forum for the trial of the action. But in such instances a more appropriate forum must be available to the plaintiff."

The doctrine of *forum non conveniens* is firmly established in the law of California. (See *Thomson v. Continental Ins. Co.*, 66 Cal.2d 738; *Goodwine v.*

Superior Court, 63 Cal.2d 481; *Price v. Atchison, T. & S.F. Ry. Co.*, supra, 42 Cal.2d 577; 1 Witkin, Cal. Procedure, pp. 441-442.) The principle has now been codified, effective July 1, 1970, as Code of Civil Procedure section 410.30. That section states: "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just."

In proper cases the doctrine will be applied to actions commenced, as here, under the Federal Employer's Liability Act. The United States Supreme Court in *Gulf Oil Corp. v. Gilbert*, supra, 330 U.S. 501, holds such an application to be in no way invasive of constitutional or other federal principles. The California Supreme Court also, in *Price v. Atchison T. & S.F. Ry. Co., supra*, 42 Cal.2d 577, 583, perceived "no reason why the doctrine should not be available in this state, upon a proper showing, and without discrimination against either noncitizens of California or against [Federal Employer's Liability Act] cases."

In *Price v. Atchison, T. & S.F. Ry. Co.*, supra, under the Federal Employer's Liability Act, a New Mexico resident, in a California court, sued a Kansas railroad corporation doing business in New Mexico and California, for damages for negligence occurring in New Mexico. The witnesses, approximately 18 in number, resided in New Mexico. Some probably could not attend the California trial, with a consequent burden on the railroad company "to present their

testimonies by deposition, at the loss of the effectiveness of their personal appearance as witnesses." The probable extra cost to the defendant of a California trial was $4,650. The Supreme Court, directing attention to the constitutional and federal permissiveness announced by *Gulf Oil Corp. v. Gilbert*, supra, 330 U.S. 501, held the doctrine of *forum non conveniens* to be applicable.

Whether or not *forum non conveniens* shall be applied rests in the sound discretion of the trial court. Unless the balance weighs strongly in favor of the defendant, the plaintiff's choice of a forum will rarely be disturbed. (See *Gulf Oil Corp. v. Gilbert*, supra, 330 U.S. 501, 508; *Price v. Atchison, Topeka & S.F. Ry. Co.*, supra, 42 Cal.2d 577, 584-585.) Nevertheless, the exercise of such discretion may not be arbitrary; it must be exercised in conformity with the spirit of the law and in a manner to subserve and not impede the ends of substantial justice. (See *Silver v. Shemanski*, 89 Cal.App.2d 520, 529.) Where the balance does weigh heavily in a defendant's favor it becomes the court's duty to apply the doctrine.

Plaintiff offers the authority of *McGovern v. Phila. & Reading R.R.* (1914) 235 U.S. 389, *American R.R. Co. v. Birch* (1911) 224 U.S. 547, *Leet v. Union Pac. R.R. Co.*, supra, 25 Cal.2d 605, *Estate of Waits* (1944) 23 Cal.2d 676, in support of her claim that the doctrine of *forum non conveniens* is inapplicable to Federal Employer's Liability Act actions. These authorities, if, and to the extent that, they are inconsistent with the later authority of *Gulf Oil Corp.*

v. Gilbert, supra, 330 U.S. 501, and *Price v. Atchison, Topeka & S.F. Ry. Co.,* supra, 42 Cal.2d 577, must be deemed disapproved by such decisions. *Thomson v. Continental Ins. Co.,* supra, 66 Cal.2d 738, and *Goodwine v. Superior Court,* supra, 63 Cal.2d 481, do not, as plaintiff contends, modify the rule of *Price v. Atchison, Topeka & S.F. Ry. Co.,* supra. As pertinent here, those cases do no more than make clear that the *domicile of the plaintiff in California* ordinarily precludes that state from applying the doctrine.

Next, plaintiff urges that the superior court's decision was reasonably based on the following considerations: (1) she (the administratrix of Mr. Gibson's estate) is a resident of the County of Alameda and of the State of California; (2) Great Northern does business in California; (3) "treating doctors" are available in California; and (4) the real party in interest[1] should be entitled to the attorneys of her choice. An analysis of these points discloses little, if any, merit.

It is, as noted, established law that the principle of *forum non conveniens* will not ordinarily apply when the plaintiff is a resident of the state where the action is brought. (*Thomson v. Continental Ins. Co.,* supra, 66 Cal.2d 738; *Goodwine v. Superior Court,* supra, 63 Cal.2d 481.) But that rule is wholly inapplicable where the plaintiff is the *resident administrator of the estate of a nonresident decedent.* (See *Thomson v. Continental Ins. Co.,* supra, p. 743; *Atchi-*

[1]In this opinion the term "real property in interest" will refer to Mr. Gibson's widow.

son, Topeka & Santa Fe Ry. Co. v. District Court, 298 P.2d 427; *Giles v. Western Air Lines*, 73 F.Supp. 616, 617-618; 35 C.L.R. 413-414.) In *Giles v. Western Air Lines*, supra, it was stated: "Plaintiff is unable to suggest any reason why the action should be tried in this jurisdiction, except that the plaintiff administratrix, an employee of the attorney who commenced the action, resides here. Obviously, the administratrix has no interest in the outcome of this lawsuit. Her appointment as special administratrix by the Probate Court of this county is admitted. She merely enters the case as a means whereby her employer, the attorney for the heirs and beneficiaries, could, for his own convenience, institute the action in this jurisdiction. She is merely the nominal plaintiff. Her residence in this District should have no weight in the scale which the Court must examine as to the equities which are presented on this motion and upon which it must exercise its discretion. At the most, it would seem that her residence is a factor of relatively little consequence. Every other factor, circumstance, and convenience is to be found in support of the application of the doctrine. No prejudice is made to appear if the heirs and beneficiaries of the deceased are required to try their lawsuit in the forum where the accident happened." (P. 617.)

Similarly the fact that Great Northern does some business in this state is entitled to scant consideration. It is that fact alone on which California *venue* was based, and without a valid venue there can be no call for the application of *forum non conveniens*. In

Price v. Atchison, T. & S.F. Ry. Co., supra, 42 Cal.2d 577, where the defendant probably conducted more business in California than in any other state, the doctrine was held to be applicable. It was said, "The principle of *forum non conveniens* is simply that a court may resist imposition on its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." (Pp. 580-581.) And as said in *Gulf Oil Corp. v. Gilbert*, supra, 330 U.S. 501, 504, "Indeed the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue."

Although in her argument below plaintiff urged "the availability of treating doctors" in California, it is obvious since Mr. Gibson suffered instant death in the accident that there were no treating doctors.

To allow the beneficiary of a cause of action to obtain and retain foreign jurisdiction simply by reaching across a number of states in selecting "the attorney of her choice" would enfeeble, if not destroy, the legitimate purpose of the doctrine here under consideration. Such permissiveness would obviously be unreasonable. It is not the law.

Certain other considerations, although not argued, are suggested by the record before us. The convenience of counsel for the plaintiff may not be given weight by the court; this is conceded by plaintiff. Nor may the probability, if such exists, that courts and juries in large metropolitan areas will be more generous in their awards be considered. (See discussion, *Gulf Oil Corp. v. Gilbert*, supra, 330 U.S. 501, 509-510.)

Several authorities[2] have announced legitimate factors to be considered by the court in determining whether the doctrine of *forum non conveniens* should be applied. We set forth a composite of these considerations, with our conclusion whether the facts of the instant case as applied to the several factors, operated affirmatively, neutrally or negatively as support for Great Northern's motion to dismiss.

1. The amenability of the defendant to personal jurisdiction in the alternative forum. *Affirmatively.* Great Northern may readily be served with process, and sued, in Washington.

2. The relative convenience to the parties and witnesses of trial in the alternative forum. *Affirmatively.* The real party in interest and all witnesses reside in Washington. Obviously the convenience of Great Northern would be served by a Washington trial.

3. The differences in conflict of law rules applicable in this state and in alternative forum. *Neutrally.* It does not appear that either party might be prejudiced or even inconvenienced by such rules.

4. The principal place of business of the defendant. *Affirmatively.* The principal place of business of Great Northern is Minnesota and it carries on extensive business operations in Washington.

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[2](Gulf Oil Corp. v. Gilbert, supra, 330 U.S. 501, 508-509; Gaudarino v. Superior Court, supra, 62 Cal.2d 481, 485; Price v. Atchison, T. & S.F. Ry. Co., supra, 42 Cal.2d 577, 584-586; 1969 Report of Judicial Council of California, p. 93; 21 Hastings L.J. 1265.)

5. Whether the situation, transaction or events out of which the action arose exists, occurred in, or had a substantial relationship to this state. *Affirmatively.*

6. Whether any party would be substantially disadvantaged in having to try the action (a) in this state or (b) in the forum in which the moving party asserts it ought to be tried. *Affirmatively.*

7. Whether any judgment entered in the action would be enforceable by process issued or other enforcement proceedings undertaken in this state. *Neutrally.* A judgment rendered in either state could be readily satisfied.

8. Whether witnesses would be inconvenienced if the action were prosecuted (a) in this state or (b) in the forum in which the moving party asserts it ought to be prosecuted. *Affirmatively.* Obviously the convenience of the Washington witnesses would be served by a trial in that state.

9. The relative expense to the parties of maintaining the action (a) in this state and (b) in the state in which the moving party asserts the action ought to be prosecuted. *Affirmatively.* To Great Northern a California trial would be more expensive by $5,000; a substantial saving to plaintiff would undoubtedly result from a Washington trial.

10. Whether a view of premises by the trier of fact will or might be necessary or helpful in deciding the case. *Affirmatively.* Consideration of the nature of the accident indicates a view of the premises in Washington might be necessary or helpful.

11. Whether prosecution of the action will or may place a burden on the courts of this state which is unfair, inequitable or disproportionate in view of the relationship of the parties or of the cause of action to this state. *Affirmatively.*

12. Whether the parties participating in the action have a relationship to this state which imposes upon them an obligation to participate in judicial proceedings in the courts of this state. *Affirmatively.*

13. The interest, if any, of this state in providing a forum for some or all of the parties to the action. *Affirmatively.*

14. The interest, if any, of this state in regulating the situation or conduct involved. *Affirmatively.*

15. The avoidance of multiplicity of actions and inconsistent adjudications. *Affirmatively.* Individual joint tort feasors, if any, who presumably do not reside in California could only be reached by a separate action.

16. The relative ease of access to sources of proof. *Affirmatively.*

17. The availability of compulsory process for attendance of witnesses. *Affirmatively.* California process may not compel attendance of Washington witnesses.

18. The relative advantages and obstacles to a fair trial. *Affirmatively.* A fair trial would be better assured in the locale of the accident and of the evidence.

19. The public interest in the case. *Affirmatively.* There may be such public interest in and around Spokane, Washington; there is none in California.

20. Whether administrative difficulties and other inconveniences from crowded calendars and congested courts are more probable in the jurisdiction chosen by plaintiff. *Affirmatively.*

21. Whether imposition of jury duty is imposed upon a community having no relation to the litigation. *Affirmatively.*

22. The injustice to, and burden on, local courts and taxpayers. *Affirmatively.*

23. The difficulties and inconvenience to defendant, to the court, and to jurors hearing the case, attending presentation of testimony by depositions. *Affirmatively.*

24. Availability of the forum claimed to be more appropriate. *Affirmatively.* The statute of limitations, as indicated, will not run on the instant cause of action until August 29, 1972 (see Title 45, U.S.C. § 56).

25. The other practical considerations that make trial of a case convenient, expeditious and inexpensive. *Affirmatively.*

Weighing the several factors which should have guided the trial court's discretion it becomes apparent that the failure to apply the doctrine of *forum non conveniens* was an abuse of discretion. There was a complete absence of any showing that the legitimate interests of the widow and beneficiary of Mr. Gilman's estate will be served by a trial in Oakland, California. Upon the uncontroverted facts, the ends of justice and fairness require that the action be tried in Wash-

ington where the accident occurred and where the real party in interest and the witnesses reside.

Let the peremptory writ of mandate issue.

Ellington, J.

We Concur:

Molinari, P.J.

Sims, J.

Filed October 20, 1970,
Lawrence R. Ellington, Clerk.

[redacted]

Clerk's Office Supreme Court
4250 State Building
San Francisco, California 94102
December 17, 1970

Dear Sir: I have this day filed Order ..... Hearing Denied

In re: 1 Civil No. 28,220
Great Northern Railway

vs.

Sup. Ct., Alameda
Respectfully,

.....
Clerk.

(1st Civ 28220, Div 1)—Great Northern Railway Company, Petitioner v. Superior Court of Alameda County, Respondent; Curtin, as Administratrix, etc., Real Party in Interest. [___ C.A.3d ___.] Real Party in Interest's petition for hearing denied. Peters, J., and Mosk, J., are of the opinion that the petition should be granted.

[redacted]

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 28,220

Great Northern Railway Company,
Petitioner,

vs.

Superior Court of the State of California, County of Alameda,
Respondent.

Eleanor V. Curtin, as Administratrix of the Estate of George F. Gibson, etc., Deceased,
Real Party in Interest.

PEREMPTORY WRIT OF MANDATE

The People of the State of California to the Superior Court of the State of California, County of Alameda, Greeting:

The petition for a writ of mandate on file herein having been considered, and this court having ordered that a peremptory writ of mandate issue,

We Do Command You, forthwith upon receipt of this writ, to dismiss Alameda County Superior Court

action number 500000, entitled "Curtin v. Great Northern Railway Company".

Witness the Honorable John B. Molinari, Presiding Justice of the Court of Appeal of the State of California, First Appellate District, Division One.

Attest my hand and the Seal of this Court this 21st day of December, 1990.

Lawrence R. Ellington, Clerk,
By R. A. Swanson, Deputy Clerk.

[illegible]

[illegible]

In the Superior Court of the State of California
in and for the County of Alameda

No. [illegible]

Eleanor V. Curtin, Administratrix of the Estate of George F. Gilman, also known as George F. Gilman, Jr., Deceased,

Plaintiff,

vs.

Great Northern Railway Company, a corporation,

Defendant.

JUDGMENT IN ACCORDANCE WITH WRIT OF MANDATE

In accordance with the direction of the Court of Appeal for the First Appellate District, embodied in the peremptory Writ of Mandate issued by said Court under date of December 31, 1970, in the proceeding entitled "Great Northern Railway Company, a corporation, Petitioner, vs. Superior Court of the State of California in and for the County of Alameda, Respondent, Eleanor V. Curtin, as Administratrix of the Estate of George F. Gilman, also known as George F. Gilman, Jr., Deceased, Real Party in Interest", and

identified upon the records of said Court of Appeal as 1 Civil No. 22220,

It Is Hereby Ordered, Adjudged and Decreed that judgment be and the same hereby is entered herein, in favor of the above-named defendant, Great Northern Railway Company, a corporation, and against said plaintiff, Eleanor V. Curtin, as Administratrix of the Estate of George F. Gibson, also known as George F. Gibson, Jr., Deceased, that said action be dismissed, that said plaintiff take nothing by her action, and that said defendant do have and recover its costs in this Court and the Court of Appeal, in the sum of $566.66.

Done and Rendered this 29th day of December, 1970.

/s/ Lyle E. Cook,
Judge of the Superior Court.

Endorsed, Filed, December 29, 1970,
Jack G. Blue, County Clerk,
Louis Hurley, Deputy.